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91-1648

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

MAJOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA,

Cross Petitioners,

v.

JIM JOINER; JOHN MILNER

Cross Respondents.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Whether the statements made by the Officers is speech protected by the First Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption. The presently listed mayor and council members of the Town of Morris are parties to this action in their official capacities only, as the duly elected representatives of the Town. They were substituted for the originally-named mayor and council members when the originally-named officials of the Town left office after the commencement, and during the pendency, of the proceedings below. A.1.

This action was instituted against the following originally-named elected representatives in their official capacities only: Mayor Lamar Reid and council members Gene Chambers, Ed Reno and Charlie Lollar. The suit also originally named council members Earl Peyton and Frank Keith as Defendants in their official and individual capacities. The Petitioners later voluntarily dismissed Peyton and Keith in their individual capacities after their deaths.

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OPINIONS BELOW

The September 6, 1991 Opinion of the Alabama Supreme Court is reported at 590 So. 2d 195 (Ala. 1991), and is reprinted at A.1-19. The November 8, 1991 decision of the Alabama Supreme Court denying, without opinion, the Officers' application for rehearing is also reported at 590 So. 2d 195 (Ala. 1991). A.1. The November 16, 1990 order of the Trial Court, entering judgment on behalf of the Officers, is not reported and is reprinted at A.20-25.

STATEMENT OF JURISDICTION

The decision of the Alabama Supreme Court issued on September 6, 1991 became final, for purpose of review by this Court, on November 8, 1991 when the Alabama Supreme Court denied, without opinion, the Officers' application for rehearing. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Officers' application to extend the time for filing their petition for writ of certiorari was received by this Court on January 28, 1992. The addendum to the Officers' application was received by the Court on January 30, 1992. On February 4, 1992 the Court extended the time for filing the petition for writ of certiorari to, and including, March 12, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).A.57.

The Cross Petitioners were served with a copy of the original Petition for Writ of Certiorari on March 12, 1992. This Cross Petition is filed pursuant to United States Supreme Court Rule 12.3, and this Cross Petition is timely filed, having been filed within thirty (30) days after receipt of the original Petition for Writ of Certiorari (Docket Number 91-1497). However, this Cross Petition for Writ of Certiorari is only due to be granted if this Court grants the original Petition for Writ of Certiorari.

STATUTES INVOLVED

This Cross Petition for Writ of Certiorari involves U.S. Const. amend. I which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free speech thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Jim Joiner, was employed as the police chief for the Town of Morris. John Milner, was employed as a sergeant on the Town of Morris police force. Hereinafter, they will be referred to as "Joiner", "Milner" or referred to collectively as "the Officers". The Officers' employment was subject to the terms and conditions of the "Town of Morris Personnel Policy". (R.T. 223; Plaintiffs' Exhibit 6).

At the time of the incidents made the basis of this lawsuit, the Town Council for the Town of Morris was comprised of the following individuals: Earl Peyton, Gene Chambers, Ed Reno, Charlie Lollar, Frank Keith and Lamar Reid (Mayor of the Town of Morris). These individuals were elected to their positions and received $5.00 a month in compensation for serving as Councilmen. (R.T. 592). Hereinafter, the Councilmen will be referred to individually by their last names or collectively as "the Council" or "the Councilmen".

In October of 1983, Mayor Reid prepared a proposed budget for the following fiscal year (1984). (R.T. 189, 471-473.) Joiner was involved in the preparation of the budget with Reid and had input into its contents. (R.T. 190-191). The proposed budget for 1984 included substantial salary raises for the Officers, and Joiner was to be awarded a newly created position of Administrative Assistant. (R.T. 190). The Administrative Assis-

tant position would pay an additional salary in the range of $3,000.00 to $5,000.00. (R.T. 594-595).

The proposed 1984 budget was rejected by the Council. (R.T. 191). The 1984 budget that was ultimately passed did not include the Administrative Assistant position for Joiner, and the proposed raises for the Officers and other Town employees were reduced to 12%. (R.T. 192).

After Reid's proposed 1984 budget did not pass, the Officers discovered that two members of the Council (Peyton and Keith) had purchased tires for their personal vehicles through the Town's account. (R.T. 473-474). Buying tires through the Town's account allowed the individuals to take advantage of the Town's discount, thereby, allowing the individuals to buy the tires at below retail price. The Officers claim that Milner discovered the invoices reflecting that tires had been purchased through the Town's account, and he showed the invoices to Joiner. (R.T. 192-193).

In early December of 1983, Joiner took the invoices and showed them to Mayor Reid. (R.T. 193). Joiner testified that he turned this matter over to the Mayor, because he felt that was the proper means for handling the situation. (R.T. 193). The invoices reflect that Peyton and Keith purchased tires through the Town's account. (Plaintiffs' Exhibit 1 through Plaintiffs' Exhibit 5). In addition to the two Councilmen, however, the invoices also reflect that Bobby Keith, the son of Frank Keith, purchased tires through the Town's account. (R.T. 248). Bobby Keith was not and has never been a member of the Council. (R.T. 248).

Keith and Peyton subsequently took the matter themselves to the Ethics Commission in Montgomery, Alabama and to the Jefferson County District Attorney's office. (R.T. 597). They were informed that the matter should be resolved internally by the Town Council. (R.T. 597).

On December 17, 1983, a Saturday, late at night, the Officers called Keith, Peyton, Lollar and Reno at their homes and asked them to come to the Town Hall. (R.T. 76-77, 193-194).

The Officers called this meeting to confront Keith and Peyton with the ire situation, and Milner initially informed Keith that he was going to read Keith his rights. (R.T. 78, 194). The meeting generally accomplished nothing, except upsetting the individuals involved. (R.T. 195). The Officers did not consult with Mayor Reid before calling the Councilmen to the Town Hall, nor was Mayor Reid advised of the same in advance of said meeting. (R.T. 194).

It is noteworthy that the Officers never made any attempt to question or otherwise pursue Bobby Keith (the non-Councilman) about his purchase of tires. (R.T. 76-77, 193-194).

The next day, on December 18, 1983, the Council met in special session to arrive at a solution to the tire situation. (R.T. 195-196). Generally, the Council agreed that the solution to the problem was to have Peyton and Keith pay the difference between the Town discount and the retail price of the tires, and Peyton and Keith would not approve anymore purchase orders on behalf of the Town of Morris. (R.T. 596; Joint Exhibit 3). Following this meeting, Mayor Reid advised the Officers that the Council had handled the situation, and this was to be the end of the matter. (R.T. 359).

Also, around this same time, there was an incident involving the viewing of some "x-rated" movies in the police department. According to Joiner's testimony, he was in the police office when several unidentified individuals began watching the "x-rated" movies. (R.T. 247-248). Once the movies began, and Joiner saw that they appeared to be "x-rated", he left the office without taking any action to prohibit the viewing of the same. (R.T. 247-248). Subsequent to the viewing of the movies, Mayor Reid became aware of the incident, and in December of 1983, he posted a note on the police office door stating that no further viewing of "x-rated" movies would be allowed within the department. (R.T. 237).

Subsequent to the rejection of Mayor Reid's proposed 1984 budget, the relationship between the Officers and the Council deteriorated substantially as exemplified by the evidence.

After the proposed budget was rejected, Chambers attempted to talk to Joiner about the various events, but Joiner refused to talk to Chambers responding that he did not have "a damn thing to say" to Chambers. (R.T. 618-619).

During this same time frame, Chambers complained that the Officers were not actively patrolling his skating rink business located in the Town of Morris. There had been no problems patrolling his business before the rejection of Mayor Reid's proposed budget. (R.T. 618-619).

Following the rejection of Mayor Reid's proposed 1984 budget, there was an occasion where Chambers was approached by Milner, and Milner asked if he could discuss some of the events with Chambers. Chambers noted that there appeared to be something irregular on Milner's person, and when he asked Milner about it, Milner produced a tape recorder from his pocket. Chambers suspected that Milner intended to record the conversation. (R.T. 623-624).

There was also an incident in this time frame in which Joiner borrowed Milner's tape recorder and recorded a telephone conversation with Mayor Reid. (R.T. 205-206). Milner knew that Joiner intended to tape Reid's conversation. (R.T. 205-206). Joiner discussed the problems with Reid during the conversation and recorded the same without Reid's knowledge or permission. (R.T. 205-206).

The deterioration of the relationship between the Council and Officers is further exemplified by the fact that the Officers took the position that they were under no obligation to cooperate with Keith or follow his directives. (R.T. 238-240, 338). This is significant, because Keith had been appointed by Mayor Reid as the Councilman responsible for overseeing the operations of the police department. (R.T. 602).

Joiner's own realization of the deterioration of the relationship is exemplified by his testimony that as early as December, 1983, Joiner feared that his job was in jeopardy. (R.T. 234).

On December 27, 1983, the Town Council met in regular session. All Councilmen were present except Reno and Lollar.

(Joint Exhibit 4). At this meeting, the November Financial Statement was distributed, and Mayor Reid discussed the financial strain that was afflicting the Town. A motion was made that the Town borrow $8, 500.00 on a ninety-day note to cover payroll expenses. (R.T. 599; Joint Exhibit 4). The motion was unanimously approved by the Councilmen in attendance. (Joint Exhibit 4).

Around the first of 1984, Keith decided to alter the work schedules within the Police Department. (R.T. 620). Both of the Officers resented these schedule changes, and both openly complained that the changes were in retaliation for their involvement in the tire situation. (R.T. 237, 620).

The Council next met in regular session on January 10, 1984. (Joint Exhibit 5). All Councilmen were present with the exception of Lollar. (Joint Exhibit 5). At this meeting, the financial status of the Town was discussed, and a motion was made to lay off Jimmy Traywick (the dispatcher), demote Frankie Witt (a police officer) to the dispatcher position, cut all regular full-time employees' salaries 5%, and thereafter make an in-depth study of finances every thirty days. (R.T. 599; Joint Exhibit 5). The motion was approved by all Councilmen present with the exception of Mayor Reid who voted against it. (R.T. 199, 600; Joint Exhibit 5).

It is noteworthy that the Council's actions affected several individuals who were not involved in the tire situation. Traywick was laid off, Witt was demoted, and the 5% pay cut applied to the City Clerk, Anna Grooms. (R.T. 195-197).

It is also noteworthy that the 5% pay cut, when applied to the previous 12% raise, still left the Officers with a net 7% raise over their 1983 salaries. (R.T. 241).

At the January 10, 1984 Council meeting, the Councilmen present also unanimously approved the use of daily shift reports, and approved the practice of policemen logging in and out of service with the dispatcher and/or clerk while on duty. (Joint Exhibit 5). Chambers explained that he voted in favor of the additional reporting, because there was a perceived

need to know where the policemen on duty were at any given time for safety reasons. (R.T. 601-602). A copy of the "Daily Shift Report" and the directive regarding logging in and out of service are attached to the minutes for the January 10, 1984 Council Meeting. (Joint Exhibit 5).

The Officers resented the pay cut and the directives and voiced their opinions that these actions by the Town Council were in retaliation for the Officers' involvement in the tire situation. (R.T. 582, 602-603, 620-621).

The Council next met in regular session on January 24, 1984. (Joint Exhibit 6). All Councilmen, the Officers, members of the public and the press were present at this meeting. (R.T. 201, 325, Joint Exhibit 6). Without any forewarning, Joiner stood up in the Council meeting, before the Council, the members of the public present and the press, and read a letter to the Council stating that the recent pay cuts and layoffs were in retaliation for the tire situation. (R.T. 200; Joint Exhibit 6). Joiner knew that the press was present when he read his letter in the meeting. (R.T. 201). Joiner did not advise anyone, including the Council members, that he intended to read the letter prior to reading the same, nor did he show anyone a copy of the letter prior to reading the same in the Council meeting. (R.T. 201).

The Council next met in regular session on February 14, 1984. (Joint Exhibit 7). All Council members were present except Keith and Chambers. (Joint Exhibit 7). Near the end of this meeting, Mayor Reid called upon the members of the public present for any comments concerning the Town, and Milner's wife questioned the Town spending money on the ball park after cutting employees' (including her husband's) salaries. (Joint Exhibit 7). Mayor Reid explained that the money used for the ball park was derived from a revenue sharing program, and that money was specifically earmarked for the ball park and senior citizen activity. (Joint Exhibit 7).

The Council next met in regular session on February 28, 1984. (Joint Exhibit 8). During this meeting, Chambers ques-

tioned the Town's paying for full family medical coverage for Joiner. (Joint Exhibit 8). In response to the previous discussions about the financial status of the Town, Chambers requested Keith to provide Chambers with a full breakdown of the expenses within the police department (Keith was in charge of the Police Department). (R.T. 607-609). When Chambers reviewed the detailed breakdown, he discovered that the Town was paying for full family medical insurance for Joiner. (R.T. 607-609). Chambers recalled that in the January 26, 1982 meeting the Council voted to provide only single coverage health insurance for new employees, effective January 26, 1982. (R.T. 482, 593-594; Joint Exhibit 1). Since Joiner resigned from his position in February of 1982 and was subsequently rehired in March of 1982, Chambers took the position that the Town should not provide him with full family medical insurance. (Joint Exhibit 2, Joint Exhibit 8, Defendants' Exhibit 3). All Councilmen, except Mayor Reid and Lollar, voted in favor of only paying for Joiner's individual medical insurance. (Joint Exhibit 8). Lollar and Reid voted against cutting Joiner's insurance benefit. (R.T. 200, 481)

Subsequent to the action of the Council cutting Joiner's insurance benefit, the Officers again raised the tire situation and accused all Council members of cutting Joiner's insurance benefit in retaliation for the tire incident. (R.T. 582, 621).

Either the last day of February, 1984 or the first day of March, 1988, Joiner moved out of the Town of Morris to Jasper, Alabama. (R.T. 180-181). Joiner explained that he moved and his wife took a job at this time because it was apparent to him that he was going to be terminated. (R.T. 183-184).

The Town Council next met in regular session on March 13, 1984. (Joint Exhibit 9). All Council members were present. (Joint Exhibit 9). During this meeting, Mayor Reid read and discussed "Resolution Number 84-3", which was unanimously approved by the Council. (Joint Exhibit 9). "Resolution Number 84-3" stated as follows:

> WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> WHEREAS, the Council wants to try to resolve the problems as it is detrimental to the operation of the Town.
>
> WHEREAS, the Council is giving two weeks to work the problems out and if a solution cannot be settled on, then the Council will have to resolve the matter at the next Council meeting.

(Joint Exhibit 9). Joiner and Milner were present at this meeting and heard the Mayor read the Resolution. (R.T. 201-202, 326). The Officers also once again heard the Councilmen discuss the problems between the Council and the Officers. (R.T. 201-202).

After Mayor Reid read "Resolution Number 84-3", and it was unanimously adopted by the Council, Milner asked Mayor Reid to explain the Resolution. (R.T. 327; Joint Exhibit 9). Reid explained that the Council was willing to meet with the Officers within the next two weeks to get any input that the Officers had into finding a solution to the problems, but if no solution was reached by the next Council meeting, then the Council would bring their own solution to the table. (R.T. 327-328; Joint Exhibit 9). The Council agreed to set a meeting date with the Officers to discuss the problems. (Joint Exhibit 9). Milner was not satisfied with Mayor Reid's explanation. (R.T. 328).

On March 15, 1984, the Officers and the Council met in special session to discuss settling the problems that had arisen between the Officers and the Council. (R.T. 202; Joint Exhibit 10). The minutes of the meeting reflect that many problems were discussed by the Council and the Officers including the following: (1) the business of the Town was not being handled properly; (2) there was a lack of cooperation between the Officers and the Council; (3) chief Joiner moved out of town to Jasper; (4) Joiner acquired an unlisted phone number at

home; (5) Joiner would not answer telephone calls; (6) the Officers failed to get the anticipated raise in salary; (7) bringing television media to the Council meetings was wrong; (8) the tire situation was handled wrong; (9) the Mayor should have handled the tire situation in its entirety; (10) the salary cuts were justified and in the best interest of the Town; (11) the method for preparation and approval of the 1984 budget should have been handled differently; (12) feelings were hurt on both sides; (13) misunderstandings and misinformation were contributing to the problems between the Council and the Officers, and (14) a new procedure needed to be devised for following up on outstanding bonds from court work. (Joint Exhibit 10). Joiner admits that during this meeting he advised the Council that he would not be satisfied under any circumstances until he got back his 5% raise and his full family insurance benefits, and he further stated that the problems between the Council and the Officers were not going to go away until he got them back. (R.T. 129, 204-205). Milner claims that he was told to sit down and shut up during the course of this meeting. (R.T. 204, 239). Notably, this is the only meeting where Milner claims he was prevented from speaking, and Joiner does not claim that he was ever prevented from speaking. (R.T. 331). The Councilmen deny that the Milner was ever told to sit down and shut up at any meeting, including the March 15, 1984 meeting. (R.T. 488, 613). During this meeting, the Officers did not advise the Council that they intended to file a lawsuit against the Council members in the near future. (R.T. 206).

On March 23, 1984, eight days following the special session, the Officers filed suit against the Council. (R.T. 206; Defendants' Exhibit 1). The Officers' Complaint named each and every one of the Council members in their official capacities and also named Keith and Peyton in their individual capacities as well. (Defendants' Exhibit 1). The Complaint alleges that the pay cuts, reduction of Joiner's insurance benefits, scheduling changes and other changes within the police de-

partment were done in retaliation for the Officers' involvement in the tire situation. (R.T. 207-208; Defendants' Exhibit 1). The Complaint states four counts, each seeking $250,000.00 in damages against each and every one of the Council members regardless of whether the individual Council member had voted in favor of the Officers on any particular issue or whether the individual Council member was even present at any particular meeting. (R.T. 206-207; Defendants' Exhibit 1).

The Council next met in regular session on March 27, 1984. (Joint Exhibit 11). All Council members and the Officers were present at this meeting. (R.T. 613-614; Joint Exhibit 11). During the course of this meeting, the problems between the Officers and the Council were again discussed, and Reno, Chambers and Peyton all made comments regarding the same. (R.T. 330-331,614; Joint Exhibit 11). The Officers were present during this meeting and were given an opportunity to respond, but Milner made no comment. (R.T. 330, 316-314).

Immediately following the regular session on March 27, 1984, the Council met in a special session to further discuss a resolution to the problems between the Officers and the Council. (Joint Exhibit 11). During this meeting, the Council discussed the fact that they had previously agreed to give the Officers two weeks to work out the problems, and if no agreement was reached between the parties, then concrete action was to be taken at the March 27, 1984 regular session. (Joint Exhibit 11). The Council noted that no agreement had been reached between the parties, and since their last meeting, the Officers had filed their previously referenced lawsuit. (Joint Exhibit 11). The Council further discussed that the situation between the Council and the Officers was hindering the ability to give the Town the services it deserved. (Joint Exhibit 11). At the conclusion of this meeting, the Council agreed to meet again on March 29, 1984 to make a final decision about what action to take to end the problems between the Council and the Officers. (Joint Exhibit 11).

The Council next met in special session on March 29, 1984 for the purpose of arriving at a solution to the problems existing between the Officers and the Council. (Joint Exhibit 12). Prior to this meeting, Joiner heard that the Council had made up its mind to terminate him at this meeting. (R.T. 235). All Council members and the Officers were present at this meeting. (R.T. 210-211; Joint Exhibit 12). News reporters and television cameras were also present at this meeting. (R.T. 216, 618).

Mayor Reid opened the meeting by explaining that the purpose of the meeting was to resolve the conflict between the Officers and the Council. (Joint Exhibit 12). He explained that the matter was open for discussion, and any and all opinions on the subject would be welcomed. (Joint Exhibit 12). He advised that Council members would speak first and then anyone else could speak. (Joint Exhibit 12). During this meeting, the Councilmen stated that they had met with the Officers in an attempt to work things out, but it now appeared that any decision made by the Council members would be overshadowed by the threat of a lawsuit, and the day-to-day business of the Town was not being properly conducted as a result of the deteriorated relationship between the Council and the Officers. (Joint Exhibit 12). While Keith and Peyton were in attendance at this Council meeting, neither made any comment during the course of the same. (R.T. 215; Joint Exhibit 12).

During the meeting, several citizens spoke on the subject of varying complaints. (R.T. 211, 333; Joint Exhibit 12). Generally the citizens backed the Council, did not like the adverse publicity that the Town had received as a result of the way the Officers had handled the tire situation and objected to the showing of x-rated movies in the police department. (R.T. 333-334; Joint Exhibit 12).

During this meeting, both Officers were present and given an opportunity to respond to the varying complaints. (R.T. 615).

Mayor Reid read a statement concerning the matter, stating that the situation had severely hampered the day-to-day operation of the Town's business, and that in light of the situation, he recommended the Officers resign. (Joint Exhibit 12). He further recommended that the Officers should be terminated if they chose not to resign. (Joint Exhibit 12).

Mayor Reid called upon the Officers to make any comments or present their side of the story. (R.T. 216). Joiner responded that he would not resign, because he had done nothing wrong. (R.T. 222). Milner's only comment was that he would not resign, although his wife was present and did speak out in defense of her husband. (R.T. 211, 334).

After the Officers refused to resign, the Council voted to adopt the Resolution of Mayor Reid. All Councilmen voted in favor of terminating the officers with the exception of Keith and Peyton who abstained from voting. (R.T. 222, 338; Joint Exhibit 12).

The Council members who voted in favor of the termination were in no way involved in the tire incident. (R.T. 223). Furthermore, Chambers, who voted in favor of termination, testified at trial that he did not get along with Peyton and Keith anyway, and they would not have been able to influence his vote. (R.T. 592, 624-625).

Following their termination, the Officers had a right to a post-termination hearing under the "Town of Morris Personnel Policy". (R.T. 584; Plaintiffs' Exhibit 6). The Officers were sent letters advising them that their termination would be effective immediately, and that the grounds for their dismissal were those stated in the previous meeting. (R.T. 224; Defendants' Exhibit 4). The letter further advised them that a more detailed statement of the charges would be made available upon request. (Defendants' Exhibit 4).

Neither of the Officers requested a more detailed list of charges, nor did they seek any post-termination hearing as provided for under the "Town of Morris Personnel Policy". (R.T. 226, 623). It is noteworthy that Frankie Witt, the officer

who was demoted to dispatcher, was represented by the same attorney that represented Joiner and Milner. (R.T. 622-623). Subsequent to the adverse action by the Council, Witt requested a post-deprivation hearing under the Personnel Policy. (R.T. 622-623). Witt, who was represented by the same attorney representing the Officers, was given a post-deprivation hearing in accordance with the "Town of Morris Personnel Policy" on January 26, 1984. (R.T. 622-623; Joint Exhibit 6).

Instead of seeking a post-termination hearing under the "Town of Morris Personnel Policy" the Officers merely amended their Complaint to allege that, in addition to the previous actions of the Council, the Council's termination of the Officers was in retaliation for the Officers' involvement in the tire situation. (R.T. 226, 623; C.R. 15).

The case proceeded to trial on June 18, 1990. (R.T. 1).

The Trial Judge denied the Councilmen's Motion for Directed Verdict both at the close of the Plaintiffs' case and at the close of all evidence. These motions raised and properly preserved the issue presented in this Cross Petition. (R.T. 413-469, 713-722; C.R. 247-250).

The jury subsequently returned a verdict in favor of the Officers in the amount of $100,000.00 each in compensation for the Officers' mental anguish and damage to reputation. (C.R. 285-288).

The Defendants filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial or in the Alternative, Motion for Remittitur. This motion again raised and properly preserved the issue in this Cross Petition (C.R. 291-298). The Trial Judge entered an Order on November 19, 1990 denying the Defendants' Post-Trial Motions, awarding Joiner an additional $25,430.00 for lost wages and lost insurance premium benefits, awarding an additional $39,034.06 to Milner for lost wages, and ordering reinstatement of Milner. (C.R. 367-373).

At the trial of this case, the Trial Judge allowed the Officers' claim that their pay was cut, that Joiner's family insurance benefits were reduced, that the Officers were terminated and that the Officers suffered other retaliatory conduct all in violation of their First Amendment right to free speech to go to the jury. The Cross Petitioners have consistently, at every stage in this litigation, contended that the Officers' speech is not protected under the First Amendment.

This issue was again raised and properly preserved in the appeal to the Alabama Supreme Court. *Roberts vs. Joiner*, 590 So. 2d 195, 198 and 201-202 (Ala. 1991).

The Alabama Supreme Court held in its Opinion in this case that the Officers' speech is protected under the First Amendment of the United States Constitution. *Roberts*, at 201-202.

REASONS FOR GRANTING THE WRIT

I. The Alabama Supreme Court Opinion in this case conflicts with decisions of the United States Supreme Court and several of the United States Courts of Appeals insofar as the Opinion holds that the Officers' speech was protected by the First Amendment.

The Officers had the initial burden of proof with respect to the First Amendment claims. The Officers must have initially proved that the subject speech is protected by the First Amendment. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Whether the Officers' speech is protected by the First Amendment is to be determined by the Court as a matter of law. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968).

In determining whether the Officers' speech is protected under the First Amendment, the Court must weigh competing interests. The Court must attempt to balance the interest of the employee, as a citizen, in commenting upon matters of

public concern versus the interest of the State, as an employer, in promoting efficiency of public services. *Pickering*, at 568. If the statements made by the employee are such that they would affect the working relationship between the employee and his supervisors, the State has a legitimate interest in prohibiting that speech. The exercise of such speech could deteriorate the working relationship between the employee and his supervisor, thereby, hampering the services to be provided to the public. In such a case, the employee's speech will not be protected by the First Amendment, even though First Amendment rights might be affected. *Pickering*, at 569-570.

Whether the subject speech is protected by the First Amendment is an issue of law which is reviewable de novo on appeal. *Rankin v. McPherson*, 483 U.S. 378, 385-386 (1987).

There are several cases which demonstrate that the Alabama Supreme Court's Opinion in this case conflicts with legal precedent from the United States Supreme Court and the United States Courts of Appeals.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the United States Supreme Court held that certain non-civil service employees of the Cook County, Illinois Sheriff's Office could be discharged for failure to affiliate with the political party of the current sheriff. The Court noted that the right to associate with a political party of one's choice was a basic constitutional right protected by the First and Fourteenth Amendments. *Elrod*, at 357. However, the Court went on to hold that "prohibition on encroachment of First Amendment protections is not an absolute." *Elrod*, at 360. The Court noted that "one interest which has been offered in justification of patronage is the need to ensure effective government and the efficiency of public employees." *Elrod*, at 364. The Court then weighed the competing interests and concluded that employees in policy making positions could be discharged for failure to affiliate with the current sheriff's political party. The justification for this obvious infringement on First Amendment rights was that the interest of the State in providing efficient services to the

public outweighed the individual's First Amendment right to associate with the political party of his choice.

The 11th Circuit has recognized that criticism of a supervisory employee may not be protected by the First Amendment. In *Morales v. Stierheim*, 848 F.2d 1145 (11th Cir. 1988), cert. denied, 489 U.S. 1013 (1989), Morales, a community development planner, accused the Chairman of the Community Development Board of various things, including: (1) that the Chairman lied; (2) that the chairman had requested kickbacks from Morales, and (3) that the Chairman used disruptive tactics. The Trial Court found that Morales' statements involved matters of public concern, and the jury returned a verdict in favor of Morales. On appeal, the 11th Circuit examined the statements made by Morales. The threshold issue addressed by the 11th Circuit was whether the statements addressed a public concern. The 11th Circuit concluded that the statements did address a public concern and then turned to the balancing process as outlined in *Pickering*. In analyzing the competing interests, the 11th Circuit stated:

> We must consider several factors in balancing the State's interest in efficient provision of public services against Morales' speech interest, including: (1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made. *Connick*, 461 U.S. at 151-55, 103 S.Ct. at 1692-94; *Ferrara*, 781 F.2d at 1513.
>
> State interests weigh heavily where an employee's speech thwarts the mission of the agency or impedes the performance of the speaker's duties. Also, where an employee's speech has a detrimental impact on close working relationships or destroys harmony among co-workers, "a wide degree of deference to the employer's judgement is appropriate." *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692.

> Morales' statements frustrated the pursuit of community development goals in Melrose by effectively cutting off communication between Melrose Board and OCDE.
>
> . . .
>
> The most damaging effect of Morales' statements on the governmental interest was the destruction of the necessarily close working relationship between Barrios (the Chairman) and Morales.

Morales, at 1149-50.

More particularly, several courts have examined situations almost identical to the situation in the case at bar, and have concluded that statements made by law enforcement officers critical of their supervisors are not protected under the First Amendment.

In *Cooper v. Johnson*, 590 F.2d 559 (4th Cir. 1979), the Court held that the sheriff did not violate a deputy sheriff's First Amendment Rights when the sheriff discharged the deputy for drafting a letter to the editor of a local newspaper. The letter in question stated that a former news article was inaccurate when it led the public to believe that the conclusion of a case was the result of one officer's efforts. The deputy pointed out in his letter that the sheriff's department was made up of many individuals, several of which deserved some credit for solving the case. After balancing the factors set forth in *Pickering*, the Court concluded that the deputy's speech was not protected by the First Amendment.

In *Kannisto v. City and County of San Francisco*, 541 F.2d 841 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977), the Court held that the suspension of a lieutenant police officer for describing "his supervisor as a most 'unreasonable, contrary, vindictive individual', whose behavior was 'unreasonable, belligerent, arrogant, contrary and unpleasant.'", did not violate the lieutenant's First Amendment Rights. *Kannisto*, at 842. The Court noted that the lieutenant's statements "*can be presumed* to have had a substantial disruptive influence on the regular

operation of the department." *Kannisto*, at 844 (emphasis added). In weighing the competing interests, the Court held that the interest of the State outweighed the interest of the lieutenant and found that the statements were not protected by the First Amendment.

In *Wood v. Town of Frederica*, 529 F. Supp. 403 (D. Del. 1982), aff'd, 688 F. 2d 828 (3rd Cir. 1982), the trial court held that certain statements made by the Chief of Police were not protected by the First Amendment. The speech involved a letter written by the Chief to the State Judiciary Committee making a complaint that a local magistrate had a conflict of interest between his role as Justice of the Peace and his insurance practice. "The letter soon became a source of controversy." *Wood*, at 404. The Chief alleged that the Mayor elected not to renew the Chief's contract for employment due to the statements made in the letter and based upon the desire to disassociate himself from the Chief's actions.

In balancing the competing interests, the Court focused on the deteriorated relationship between the Mayor and the Chief and stated as follows:

> Not only did his activity impair his public service by rendering further working with the Mayor impossible, but the *relationship between Mayor and Police Chief in a small town is such that it requires personal loyalty and confidence.* The record reflects not only that Wood (Chief) and Nashold (Mayor) had this type of relationship prior to the Wooten (Magistrate) letter, but also that it had totally disintegrated by the time his contract was not renewed.

Wood, at 405. (Emphasis Added). Thus, the Court balanced the competing interests in favor of the Mayor and held that the speech was not protected by the First Amendment.

In *Hoopes v. Nacrelli*, 512 F.Supp. 363 (E.D. Pa. 1981), the Court held that the Mayor did not violate the Police Chief's First Amendment Rights by demoting the Police Chief to the rank of inspector based upon statements made by the Chief.

In *Hoopes*, the Chief testified against the Mayor in a federal criminal trial on corruption charges. Subsequent to his testimony, the Chief was demoted to the rank of inspector. Although the Chief was responsible for the day-to-day operations of the department, the Mayor had the ultimate power to fashion policies and procedures. The testimony of the Chief made headlines in the small town involved, and both the Mayor and Chief retained legal counsel during the pre-trial investigation.

The Chief contended that regardless of the relationship between the Mayor and the Chief, morale remained high within the police department and the department continued to function properly. In rejecting this argument, the Trial Court stated:

> Even assuming that Hoopes (Chief) could produce evidence in support of his contention at trial, this evidence would not be material. As the 3rd Circuit noted in *Sprague*, "the key question under *Pickering*. . . is whether the employment relationship has been seriously undermined." 546 F.2d at 566. Although Hoopes may have been able to continue running the police department, Nacrelli (Mayor) retained ultimate responsibility for it under the Third Class City Code and it was necessary for Nacrelli to have a police chief in whom he had confidence. In *Sprague*, the Court affirmed the District Court's dismissal and appeared to conclude that *it is simply a matter of common sense that a public official cannot function effectively when a subordinate has publicly questioned his veracity. See* 546 F.2d at 565. . . . It is completely unreasonable to suggest that an effective employment relationship could continue to exist under such circumstances and I accept Nacrelli's contention that Hoopes demotion was necessary if Nacrelli was to perform effectively his supervisory role over the police department. Therefore Nacrelli's motion for summary judgement on the First Amendment claims will be granted.

Hoopes, at 367-68. (emphasis added).

As can be seen from the foregoing, the Trial Court determined that the Chief's speech was not protected by the First Amendment and granted a summary judgment in favor of the Mayor and other members of the town council.

In *Magri v. Giarrusso*, 379 F.Supp. 353 (E.D. La. 1974), the Court held that a police sergeant's public criticism of the Police Superintendent was not protected speech under the First Amendment. The sergeant was also the union president. There was a rather lengthy history of public statements made by the sergeant which essentially questioned the veracity of the superintendent and whether the superintendent had the best interest of the policemen in mind in discharging his duties as superintendent. The Court noted that the resolution of the issue depended upon a balancing of conflicting interests and focused on the factors enunciated by the Court in *Pickering*. The Court concluded:

> It hardly needs pointing out that the superintendent needs the confidence and loyalty of his men in order to run an effective police department in order to maintain an efficient and disciplined force.

Magri, at 361. Thus, the Court held that the speech was not protected by the First Amendment and found the issues in favor of the superintendent.

The overwhelming weight of authority compels the conclusion that the statements of Joiner and Milner, although arguably a matter of public concern, are not protected by the First Amendment. It is undisputed that the statements made by Joiner and Milner led to a deterioration of the relationship between the Officers and the Councilmen, including Mayor Reid and the Chairman of the Police Department, Councilman Keith. Councilman Keith, of course, was delegated the responsibility of overseeing the operations of the police department and had the responsibility of setting policy and procedure. (R.T. 238-240, 338, 602). Councilman Keith was also the subject of the Officers' statements and the Officers them-

selves cailm that the relationship between Councilman Keith and the Officers deteriorated substantially following the statements made by the Officers. The Officers do not seriously dispute that the relationships deteriorated, but instead insist that they were nevertheless able to perform their job duties in an efficient manner. As noted by the Court in *Hoopes*, however, the Officers' contention is immaterial to the issue at hand. The fact that the relationships had deteriorated, coupled with the fact that the Town of Morris is a small town, and the police force must work closely with the Councilmen, Mayor and Police Chairman, is of paramount importance.

Each of the above-cited cases were cited to the Alabama Supreme Court which took notice of their presence, but refused to follow their rule.

> The Trial Court did not err in submitted to the jury the plaintiffs' 42 U.S.C. § 1983 claim alleging a violation of their right to free speech. (Citations omitted).
>
> ***We are aware that there are cases that might suggest a contrary result. See Morales v. Stierheim, 848 F.2d 1145 (11th Cir. 1988); Cooper v. Johnson, 590 F. 2d 559 (4th Cir. 1979); Kannisto v. City & County of San Francisco, 541 F. 2d 841 (9th Cir. 1976), cert. denied 430 U.S. 931, 97 S. Ct. 1552, 51 L.Ed. 2d 775 (1977); Wood v. Town of Frederica, 529 F. Supp. 403 (D.Del 1982), aff'd at 688 F.2d 828 (3d Cir. 1982); Hoopes v. Nacrelli, 512 F. Supp. 363 (E.D. Pa. 1981).***

Roberts v. Joiner, 590 So. 2d 195, 202 (Ala. 1991) (emphasis added).

Clearly, as the Alabama Supreme Court opinion in this case acknowledges, the decision in this case conflicts with legal precedent articulated by several United States Courts of Appeals and with legal precedent articulated by the United States Supreme Court.

CONCLUSION

The Alabama Supreme Court Opinion in this case clearly conflicts with legal precedent articulated by several United States Courts of Appeals and by the United States Supreme Court. Therefore, if this Court grants the Officer's original Petition for Certiorari Review, this Court should also grant this Cross Petition pursuant to United States Supreme Court Rule 10.1(b) and (c) and United States Supreme Court Rule 12.3.

Respectfully submitted,

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No. 91-1648

In The

Supreme Court Of The United States

October Term, 1991

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA

Cross-Petitioners,

v.

JIM JOINER; JOHN MILNER

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statements made by Police Chief Joiner and Police Sergeant Milner, concerning the improper purchase of tires by town council members Frank Keith and Earl Peyton at a substantial discount through the town's account and for their personal use, is speech protected by the First Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption. The presently listed mayor and council members of the Town of Morris are parties to this action in their official capacities only, as the duly elected representatives of the Town of Morris. Under state law they were automatically substituted for the originally-named mayor and council members when the originally-named officials of the Town left office after the commencement, and during the pendency, of the proceedings below.

This action was instituted against the Town of Morris through the following originally-named elected representatives in their official capacities only: Mayor Lamar Reid and council members Gene Chambers, Ed Reno and Charlie Lollar. The suit against the Town was also originally instituted through council members Earl Peyton and Frank Keith in their official capacities. Peyton and Keith were also sued in their individual capacities, but the cross-respondents later voluntarily dismissed them in their individual capacities due to their deaths and the cross-respondents' decision to forego claims against their probate estates.

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In The

Supreme Court Of The United States

October Term, 1991

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA

Cross-Petitioners,

v.

JIM JOINER; JOHN MILNER

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The September 6, 1991 opinion of the Supreme Court of Alabama is reported at *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991), and is reprinted. The November 8, 1991 decision of the Supreme Court of Alabama denying, without opinion, the cross-respondents' application for rehearing is also reported at *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991). The November 16, 1990 order of the Trial Court, entering judgment on behalf of

the cross-respondents, is not reported and is reprinted at A.20-25 in the petition for writ of certiorari (No. 91-1497).

JURISDICTION

The decision of the Supreme Court of Alabama issued on September 6, 1991 became final, for purpose of review by this Court, on November 8, 1991 when the Supreme Court of Alabama denied, without opinion, the cross-respondents' application for rehearing. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The petitioners' application to extend the time for filing their petition for writ of certiorari was received by this Court on January 28, 1992. The addendum to the cross-respondents' application was received by the Court on January 30, 1992. On February 4, 1992 the Court extended the time for filing the petition for writ of certiorari to, and including, March 12, 1992. The petition for writ of certiorari was timely filed on March 12, 1992, pursuant to Rule 29.2. The cross-petition for writ of certiorari was received by cross-respondents on April 9, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). A.57.

STATUTES INVOLVED

This case involves U.S. Const. Art. VI cl. 2, U.S. Const. amend. I, U.S. Const. amend. XIV and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In summary: (a) cross-respondents Joiner and Milner were doing a good job as police officers for the Town of Morris according to Mayor Lamar Reid (RT 493, 545-546); (b) the Town's retaliation against the officers started when the officers notified Mayor Reid of the improper tire purchases by two of the councilmen, not when the proposed 1984 budget was cut (RT 68-72, 287, 294-295); and (c) the Town council discharged the officers in retaliation for the officers' statements

concerning the improper tire purchases. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991).

Cross-petitioners[1] list a number of "problems" and imply that those "problems" were reasons for the officers' discharge. Cross-Pet. 9-10. Mayor Lamar Reid, however, testified at trial that, in his opinion, the Town cut the officers' pay and took away Joiner's insurance in retaliation for the officers reporting the improper tire purchases by councilmen Chambers and Keith. (RT 571-578). The Alabama Supreme Court stated that the officers presented "substantial evidence" that they had been discharged in retaliation for reporting the improper tire purchases. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991). Mayor Reid's testimony also confirmed that the officers were not discharged for the purported "problems" cited by cross-respondents, and that cross- respondents did not notify the officers of any specific charges being leveled against them. (RT 531-578; Joint Exhibit 10). Mayor Reid also testified that Joiner and Milner were doing a good job as police officers. (RT 493, 545).

Joiner was hired as police chief of the Town of Morris on August 10, 1978. (RT 42). Under Alabama law, Joiner could be discharged only for cause and only after being provided a hearing by the Town's council.[2]

Milner was hired by the Town as a police sergeant in 1982. (RT 282-283). Milner was hired under the Town's written personnel policy, which is reprinted at A.39-50.[3] The personnel

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[1] The cross-petitioners are referred to herein by name or, collectively, by "Town of Morris" or "Town". The cross-respondents are referred to herein as "Joiner and Milner" or as the "officers".

As used herein, citations to the Appendix to the petition for writ of certiorari are identified as "A."; citations to the cross-petition for writ of certiorari are identified as "Cross-Pet."; and, citations to the Reporter's Transcript of the trial below are identified as "RT".

[2] *See Ala. Code* § 11-43-160 (1975). A.61.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).

[3] The correct Appendix number for the Town's written personnel policy is A.45-56, rather than A.39-50 as shown in the Petition for Writ of Certiorari.

policy stated that new employees would serve a six-month probationary period. A.51. Under the personnel policy, employees attained "permanent employee" status after satisfactorily serving the probationary period. A.51-52. Permanent employees could be fired only for cause. The personnel policy provided a permanent employee with the "right to hold [his or her] job permanently, conditioned upon [his or her] continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services. . . . " A.51-52. Milner successfully completed his probationary period and attained "permanent employee" status, whereupon he was promoted from patrolman to sergeant. (RT 284).

In October of 1983 the Town clerk showed Milner several invoices from the Goodyear tire store in Birmingham, Alabama.[4] (RT 63, 286-287). Those invoices showed that council members Earl Peyton and Frank Keith, as well as Keith's son, had purchased tires for their personal vehicles under the guise of buying tires for the Town of Morris. By purchasing the tires in the name of the Town, they were able to buy the tires at the substantially discounted price that was available to state and local governmental agencies through the state bid law. A.1-2. By purchasing the tires in the name of the Town, Peyton and the Keiths were also able to avoid paying state and federal taxes on the tires. (RT 69). The net result was that council members Peyton and Keith, as well as Keith's son, Bobby, were able to buy their $170.00 tires for approximately $40.00. (RT 68-69).

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[4]Photocopies of the five tire invoices were attached as Exhibit A to the petitioners' original complaint. The five photocopies were identified as plaintiffs' (petitioners') exhibits one through five at trial, and were admitted into evidence. The petitioners did not have the original tire invoices, and their photocopies of the invoices were of very poor quality. Due to the poor quality of the photocopies, they were not able to be adequately reproduced and reprinted for inclusion in the Appendix hereto. Based upon the testimony at trial, the photocopies of the five tire invoices established that council members Peyton and Keith, and Keith's son, Bobby, had purchased tires through the Town's account for their personal use. (RT 64-66, 86-91, 286-287).

Milner asked the Town clerk to make copies of the tire invoices, which he then turned over to his immediate supervisor, Joiner. (RT 287). Joiner took the tire invoices and reported the matter to the mayor, Lamar Reid. A.1-2. (RT 68, 287). Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council. (RT 70-72).

A private meeting of the Town council was held on December 18, 1983 to resolve the tire issue. (RT 101-102). At that meeting it was agreed that council members Peyton and Keith would resign from the committee that purchased goods for the Town, and that they would pay the difference between the price that they actually paid for the tires and the price that they would have paid if they had not bought the tires in the name of the Town. A.2, 33. (RT 101-102).

Following the December 18, 1983 private meeting of the Town council, the mayor called Milner in and told him that the tire matter was over. (RT 294). Later that day, however, council member Keith told Milner that the tire matter was not over, that he was not through with Milner and that things were going to be a lot different regarding the police department. (RT 294-295). Keith said that he planned to take a much larger hand in running the police department than he ever had before. A.27. (RT 294-295).

A few minutes after Keith delivered his warning to Milner, council member Peyton came to Milner and said that the situation caused by the tire matter was not resolved, regardless of what the mayor had told Milner. (RT 295). Peyton also said that he was going to "get" Joiner and Milner. A.27. (RT 295).

Shortly before January 1, 1984, council member Keith ordered Joiner to find a reason to terminate petitioner Milner. (RT 109). Joiner refused, saying that Milner had not violated the personnel policy nor committed any wrongdoing that would justify terminating him. A.2. (RT 110).

At the next meeting of the Town council on January 10, 1984, Keith made a motion to cut the pay of the Town's full-time employees by five percent. A.2, 35. (RT 111-113). The

Town's only full-time employees were Joiner and Milner, police officer Frankie Witt and the Town clerk, Anna Grooms. A.2. (RT 112). Anna Grooms was the person who originally brought the improper tire purchases to the attention of Milner. A.2. (RT 286-287). The Town also had part-time employees, but Keith did not seek to cut their pay. A.35. (RT 111-112). Council members Keith, Peyton, Reno and Chambers voted in favor of the pay cut. A.35. Mayor Reid voted against the pay cut. A.35. Joiner and Milner were given no notice prior to the meeting that the council would consider a pay cut. (RT 117).

The reason given by the council for the pay cuts at the January 10, 1984 meeting was the Town's purported poor financial condition. A.2. (RT 522-523). Mayor Reid later admitted, however, that the Town was in good financial condition at the time the petitioners' pay was cut. (RT 529, 575). Joiner later informed the council that he thought the pay had been cut because he and Milner had reported the improper tire purchases. A.2. (RT 200). Mayor Reid testified at trial that he believed that Joiner's and Milner's pay was cut in retaliation for their speaking out about the tire purchases. (RT 577-578).

At a council meeting on February 28, 1984, the council decided that the Town should not be paying the health insurance premiums on Joiner's family. A.2-3, 38-39. Prior to the meeting Joiner was given no notice that the council would be considering whether to pay the insurance premiums. Joiner let the council know that he believed the action had been taken in retaliation for his reporting of the improper tire purchases. A.2-3.

At its meeting on March 13, 1984, the Town council adopted a resolution stating that there was "a problem" existing between the council and the police department. A.3. The resolution stated that the council would allow two weeks to find a solution to "the problems" and then, if no solution was found, the council would "bring its own solution to the table." A.3. The mayor said that the council was publicly recognizing

that there was a "problem" between the Town council and the police department, and that the council was willing to meet with the police department during the next two weeks to see if the "problems" could be resolved. A.3. (RT 122-123). Milner asked the mayor to explain the resolution, but neither the mayor nor the members of the council would explain what "problem" they were referring to in the resolution. (RT 327-328).

On March 15, 1984, Joiner and Milner met informally with the mayor and members of the council. A.3. (RT 300-301). Joiner asked for the pay cut to be rescinded. A.3. (RT 129). He also requested that the Town reinstate the health insurance for his family. A.3. (RT 129). The mayor and members of the council did not agree to these requests. A.3. (RT 129).

On March 23, 1984 the complaint initiating this action was filed. A.3. The complaint, with Exhibits B through D, is reprinted at A.26-39.[5] The complaint alleged that Joiner's and Milner's pay had been cut and that Joiner's family health insurance had been terminated in retaliation for reporting the improper tire purchases to the mayor. A.30. The complaint alleged that the actions of the defendants deprived Joiner and Milner of their property without due process of law and infringed upon Joiner's and Milner's right to free speech under the First Amendment to the Constitution of the United States. A.30. The complaint also asserted causes of action under state law. A.30-31.

The next regularly scheduled meeting of the Town council was held on March 27, 1984. (RT 136). At that meeting the council chamber was full of residents of the Town who were there to express their support for the police officers. (RT 137). Instead of discussing the purported police "problems" in the presence of the residents, the council voted to have a

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[5] See n.4 *supra* regarding the explanation for omission from Appendix of Exhibit A to the petitioners' original complaint.

closed meeting immediately following the regularly scheduled meeting. (Joint Exhibit 11). (RT 139). The minutes of the closed meeting reflect that the Town's attorney recommended that the council try to find out how the residents of the Town felt about the matter. (Joint Exhibit 11). The Town's attorney also recommended that Joiner and Milner be suspended with pay for thirty days. (Joint Exhibit 11). No official action was taken. (Joint Exhibit 11).

Two days later, on March 29, 1984, Joiner and Miller were fired at a specially called council meeting. A.4, 40. None of the council members notified Joiner and Milner of the specially called council meeting. Joiner learned of the meeting when he saw Anna Grooms, the Town clerk, crying at Town Hall on March 29. (RT 141-142). Joiner asked Ms. Grooms why she was crying, whereupon she told him that there was a council meeting that night and that the council was going to fire him. (RT 142). Milner learned about the council meeting when Joiner telephoned him and told him what he had learned from Anna Grooms. (RT 306). The phone call from Joiner was the only notification to Milner that there was going to be a specially called council meeting on the night of March 29, 1984. (RT 306).

When Joiner arrived at the council chamber on the night of the 29th he noticed that it was filled with relatives of the council members. (RT 143-144). When the meeting started, the mayor read a statement saying that the unspecified "problems" were still existing with the police department, but he did not say what the "problems" were. A.4. (RT 145). The mayor then said he would like to give Joiner and Milner an opportunity to resign. A.4. (RT 146). After the mayor had read the statement, Joiner told the mayor that he would like to know what the charges against him were. (RT 146-147). The mayor's response was "Well, there aren't any really." (RT 147). Joiner then said that he had done nothing wrong and would not resign. A.4. (RT 147). The council then allowed comments from residents and relatives of council members Keith and

Peyton.[6] (RT 147-148). The mayor and members of the council then voted to fire petitioners Joiner and Milner, effective immediately. A.4, 40. (RT 148). Council members Keith and Peyton, who had purchased tires through the Town's account, participated in all of the meetings and in all of the discussions leading up to the council's vote to fire Joiner and Milner, but abstained from the actual vote to fire Joiner and Milner. A.4. (RT 147-148). Mayor Reid testified at trial that he had decided to fire the petitioners sometime prior to the March 29th council meeting. (RT 498).

On April 27, 1984, the Officers filed their Supplemental Complaint, alleging that they had been discharged by the Town in retaliation for their statements concerning the improper tire purchases by council members Peyton and Keith. The Supplemental Complaint is reprinted at A.40-41. The Supplemental Complaint alleged that the discharge was in violation of Officers' rights under the First Amendment of the Federal Constitution. A.40.

On December 5, 1984, the Officers filed their Amended Complaint, alleging that they were "permanent employees" of, and had employment contracts with, the Town of Morris under the Town's personnel policy. A.42, 51-52. They also alleged, among other things, that the Town's failure to provide them notice and a hearing prior to being discharged was a violation of their rights of due process under the Fourteenth Amendment of the Federal Constitution, and that the violation gave rise to a cause of action under 42 U.S.C. § 1983. A.42-43. The Amended Complaint is reprinted at A.42-44. The Town's Personnel Policy is reprinted at A.45-56.

At trial, the Officers dismissed their state law claims and proceeded only on their claims under 42 U.S.C. § 1983. A.4. In addition to their claims under the First Amendment, the trial court submitted the Officers' Fourteenth Amendment claims to the jury on three theories: (1) that the pay cut was a

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[6] Council members Peyton and Keith had made the improper tire purchases.

deprivation of property without due process of law; (2) that the refusal to pay Joiner's family health insurance premiums was a deprivation of property without due process of law; and (3) that the Officers' employment was terminated without due process of law. A.4, 20-25. The due process claims were based upon the Town's failure to provide the Officers with notice of charges and a hearing on those charges before cutting their pay, eliminating Joiner's family health insurance, and terminating their employment. A.20-22. The jury returned a general verdict in favor of the Officers, awarding them each $100,000. A.1, 23. The trial court awarded Joiner an additional $25,430 for lost wages and insurance premiums, and Milner an additional $39,034 for lost wages. A.1, 23. The trial court also order the Town to reinstate Milner. A.1, 23.[7]

Finally, many of the "facts and issues" cited by cross-petitioners are of the type that they argued unsuccessfully in the trial court: they are merely frivolous attempts to distract this Court from the substantive issues in this case. It didn't work with the jury; it didn't work with the trial judge; it didn't work with the Alabama Supreme Court, and it shouldn't work here. A good example of this strategy is cross-petitioners' reference to the showing of "x-rated" movies at the city hall. Cross-Pet. 4. Yet, there is no evidence in the record that "x-rated" movies had anything to do with the firing of Joiner and Milner. In fact, the record shows that neither Joiner nor Milner were even present when the movies were shown. (RT 247-248, 355). Nevertheless, cross-petitioners believe it is in their interest to tell this Court that there were "x-rated" movies shown at the town hall while Joiner and Milner were employed as police officers for the Town. The fact that cross-petitioners believe it to be in their interest to cite such irrelevant facts typifies the poverty of their arguments.

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[7] Joiner dismissed his claim for reinstatement as police chief of the Town of Morris due to a work-related injury he suffered on another job after being terminated by the Town. As a result of the injury, Mr. Joiner became totally and permanently disabled.

REASONS FOR DENYING THE CROSS-PETITION

The Alabama Supreme Court determined that the statements of Joiner and Milner to Mayor Reid, concerning the improper tire purchases by councilmen Keith and Peyton, were protected speech under the First Amendment to the United States Constitution. The Alabama Supreme Court's decision does not conflict with the decisions of the United States Supreme Court and, therefore, the cross-petition should be denied.

I.

THE STATEMENTS MADE BY POLICE CHIEF JOINER AND POLICE SERGEANT MILNER, CONCERNING THE PURCHASE OF TIRES BY TOWN COUNCIL MEMBERS FRANK KEITH AND EARL PEYTON AT A SUBSTANTIAL DISCOUNT THROUGH THE TOWN'S ACCOUNT AND FOR THEIR PERSONAL USE, IS SPEECH PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

In October, 1983, Officer Milner was first notified by the Town clerk of the improper tire purchases by council members Keith and Peyton. Milner turned the matter over to his immediate supervisor, Police Chief Joiner. (RT 287). Joiner then notified Mayor Lamar Reid about the improper tire purchases. (RT 68, 287). Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council. (RT 70-72). At that point, the Town council's retaliation against Joiner and Milner began. (RT 68-72, 287, 294-295). The retaliation involved cutting the Officers' pay, disrupting their work schedules, terminating Joiner's family insurance and, finally, discharging the Officers without notifying them of the charges against them or providing them an opportunity to respond. (RT 111-113, 129, 294-295, 571-578) *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991); (RT 531-578; Joint Exhibit 10).

The trial court correctly determined, as a matter of law, that the plaintiffs' statements to Mayor Reid about councilmen Keith and Peyton purchasing tires through the Town of Morris were protected under the First Amendment to the United States Constitution. A.21. (RT 467, 413-466). *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 282-284, 287 (1977); *Allen v. Autauga County Board of Education*, 685 F.2d 1302, 1304 (11th Cir. 1982); *Sykes v. McDowell*, 786 F.2d 1098, 1103-04 (11th Cir. 1986); *Kingsville Independent School District v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1098-1100 (5th Cir. 1987); *Wulf v. City of Wichita*, 883 F.2d 842, 856-859 (10th Cir. 1989); *Robb v. City of Philadelphia*, 733 F.2d 285, 295-296 (3rd Cir. 1984).

On appeal by the Town, the Alabama Supreme Court affirmed the decision of the trial court, holding that:

> . . . If it is determined as a matter of law that the speech is protected, the plaintiff must prove that the speech was a substantial or motivating factor in challenged employment decision. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).
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> . . . Joiner and Milner's speech in turning in the councilmen for the improper tire purchases was a matter of public concern . . . [and] . . . Joiner and Milner's interest (as well as the public's), in the free speech involved in turning in Keith and Peyton outweighed any purported state interest in promoting the efficiency of public services. The law should not allow the Town to create problems with Joiner and Milner because of their reporting the improper tire purchases and then use the very problems it created as a basis for saying that it has a greater interest in efficiency of public services than Joiner and Milner have in free speech.

Roberts v. Joiner, 590 So.2d 195, 201, 202 (Ala. 1991).

In its decision, the Alabama Supreme Court further determined that:

> Joiner and Milner "presented substantial evidence that the speech was a substantial or motivating factor in the challenged employment decisions. Even the mayor of the Town said, both in his deposition and again at trial, that he thought the town council's actions were in retaliation for Joiner and Milner's telling about the improper tire purchases.

Id.

As police officers, sworn to uphold the law, Joiner and Milner had a duty to notify Mayor Reid about the improper tire purchases by council members Keith and Peyton. As police officers and citizens, Joiner and Milner also had the right, under the First Amendment, to tell the mayor that council members Keith and Peyton were using the Town's purchasing account for their personal financial gain. And, the Town council was not entitled to discharge Joiner and Milner in retaliation for their reporting of the improper tire purchases. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987).

CONCLUSION

For the foregoing reasons, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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